YOONG JIH PING & ANOR.

v.

GUNAPATI S/O SUPPIAH & 13 ORS.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF JC
[SUMMONS NO. 22-59-1993]
20 APRIL 1995

PRACTICE & PROCEDURE*: Application to strike out writ of summons and statement of claim - Order 18 r. 19(1) RHC 1980 - Application made after defences filed - Whether application appropriate at this stage of proceedings - Application made on the grounds that Court has no jurisdiction to try the matter - Whether s. 16 of the Societies Act 1966 ousts the jurisdiction of the Court.*

PRACTICE & PROCEDURE*: Application to strike out writ of summons and statement of claim - Order 18 r. 19(1) RHC 1980 - Application made on the grounds that Court has no jurisdiction - Preliminary objection by plaintiff - Question of jurisdiction not raised in pleadings - Preliminary objection raised at hearing of application - No notice of preliminary objection given to other side - Whether preliminary objection should be overruled.*

The plaintiffs claimed that they were the President and Secretary respectively of the Johor Consumers Association (JCA), a society registered under the Societies Act 1966 (the Act). The plaintiffs filed a writ against the defendants praying *inter alia* for an injunction restraining the defendants from representing or holding themselves out as the new office-bearers of the Executive Council of the JCA and various other declarations.

The defendants (except for the 6th and 7th defendants) applied under O. 18 r. 19(1) of the Rules of the High Court 1980 (RHC 1980) to strike out the writ of summons and the statement of claim. The defendants claimed that the Court had no jurisdiction to hear the matter and argued that since the matter amounts to a dispute amongst officebearers of a society registered under the Act, the matter has to be referred to the Registrar of Societies in accordance with s. 16 of the said Act and the Court has no power to deal with the matter.

At the outset of the hearing of the application, Counsel for the plaintiffs raised a preliminary objection to the effect that the issue of jurisdiction was never raised in the pleadings. In reply, Counsel for the defendants argued that the preliminary objection should be dismissed as no notice was given.

Held:

[1] Bearing in mind the decision *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor*. wherein the learned Judge said that by filing affidavits in opposition and failing to give prior notice of an intention to raise a preliminary objection, the party which raised it has waived their rights to take the preliminary objection, the plaintiff' preliminary objection should be overruled and the application heard on its merits.

[2] Looking at the ingredients of s. 16 of the Act, it was plain to see that the contention that the section is a mandatory section and ousts the jurisdiction of the Court cannot hold water. The section does not even provide that the Registrar shall determine the dispute or adjudicate upon it. The section merely provides that if the Registrar is of the opinion that a dispute has occurred as a result of which he is not satisfied of the identity of the persons

who have been properly constituted as office-bearers, he may serve such notice upon the society. Under the circumstances, s. 16 of the Act does not oust the jurisdiction of the Courts and on that ground alone the defendants' application should be dismissed with costs.

[3] It was difficult to see how the writ and statement of claim could be said to be an abuse of the process of the Court. The plaintiffs had sought relief by informing the Registrar of Societies about the dispute, but had met with no response. In the circumstances it could not be said that s. 16 of the Act could preclude the plaintiffs from seeking relief from the Court.

[4] In an application to strike out a pleading, the attitude of the Courts generally is clear, the application should be made promptly and preferably before filing the defence. In the present case, defence had been filed and the plaintiffs had even managed to obtain an interim injunction in their favour. Under such circumstances the defendants' application to strike out the writ and statement of claim was not appropriate.

[Application to strike out dismissed with costs]

Cases referred to:

The "Avro Venture"; Forsythe International Ltd. v. "Avro Venture", Owners of [1987] 1 MLJ 16 ***(cit)***

Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor. [1985] 1 MLJ 394 ***(foll)***

Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. (No. 2) [1983] 1 MLJ 412 ***(dist)***

S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors. [1993] 2 AMR 41:3047 ***(dist)***

Subramanian v. Tan Lee Leng [1980] 1 MLJ 171 ***(dist)***

Legislation referred to:

Co-operative Societies Ordinance 1948, s. 49(1) & (2)

Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19(1), O. 92 r. 4

Societies Act 1966, ss. 2, 14, 16(1) & (2), 40

Other source referred to:

Mallal's Supreme Court Practice (2nd Edn.) Vol. 1 p. 225

For the applicants/defendants - S. Gunapati (Mary Cocheril with him); M/s. Rozinah Nizaruddin, S. Gunapati & Co.

For the respondent/plaintiffs - Kamsimah binti Mohamed; M/s. Lau Kok Guan & Partners

JUDGMENT

Mohd. Ghazali bin Mohd. Yusoff JC:

This was an application by the defendants (except for the 6th and 7th defendants) under O. 18 r. 19(1) of the Rules of the High Court 1980 for the following orders, namely, to strike out the writ of summons together with the statement of claim and any interim order granted on the grounds that the Court has no jurisdiction to try the matter and that the action is an abuse of process of the Court and for costs.

The background leading to the application is as follows:

On 27 February 1993 the plaintiffs, who claim that they are at all material times the president and secretary, respectively, of the Johor Consumers Association (1979) (hereafter referred to as "the JCA"), a society registered under the Societies Act 1966, filed a writ against the defendants praying for the following reliefs, namely:

(1) an injunction that the defendants and/or their agents be prevented from representing or holding themselves out as the new office-bearers of the Executive Council (EXCO) of the JCA;

(2) a declaration that the election of the new office-bearers held during the annual general meeting of the JCA held on 20 February 1993 is illegal and null and void;

(3) a declaration that the 1st and 2nd plaintiffs are the lawful president and secretary, respectively;

(4) damages; and

(5) costs.

According to the statement of claim, between the months of September and December 1992, the 1st defendant, who at that material time was a member of the EXCO and who incidentally is an advocate and solicitor, had been recruiting new members without the mandate or instructions from the EXCO through the business office of one Lee & Ong Service and General Agencies. The membership drive was targeted at members of the public who had purchased houses in an abandoned housing scheme known as Putri Wangsa. At an emergency meeting of the EXCO held on 28 December 1992, in which the 1st, 2nd, 3rd and 4th defendants, being members of the EXCO, were present, the EXCO resolved that the JCA will reject all applications for membership which have been processed by that agency and further resolved that the 1st defendant is to refrain from continuing with the membership drive.

The 1st defendant however ignored that resolution and carried on with the membership drive from that said section of public and requested them to pay the sum or RM250 being legal fees which according to him will be paid to a firm of advocates and solicitors to be appointed by the JCA, for the purpose of providing legal aid.

Subsequently at the annual general meeting of the JCA held on 20 February 1993, the plaintiffs claimed that the 1st defendant seized several documents from the registration clerk on duty and brought several persons, whose applications for membership allegedly have been rejected by the EXCO, to attend the meeting.

The meeting could not proceed smoothly allegedly because of the mess created by these non-members as a result of which the 1st plaintiff announced that the meeting is adjourned and left the meeting hall together with the 2nd plaintiff and some members of the EXCO. The plaintiffs then claimed that the defendants refused to abide by that decision, appointed a new chairman to conduct the meeting and carried on with the election of new office-bearers in which several non-members participated. Incidentally the 1st, 3rd and 4th defendants were elected as the new president, secretary and treasurer of the JCA respectively and consequently carried on with the running of the JCA by representing themselves as the new office-bearers.

On the same day the writ was filed the plaintiffs filed an application by way of summons-in-chambers praying for the following reliefs, namely:

(a) an interim injunction against the defendants to prohibit them:

(i) from representing or holding themselves out as the new office-bearers of the JCA;

(ii) from entering into any dealings with any person as representatives of the JCA;

(iii) from utilising the bank account of the JCA kept at the Bank of Commerce, Johor Bahru.

(b) a declaration that the election held on 20 February 1993 at the AGM is null and void;

(c) a declaration that the 1st and 2nd plaintiffs are still the lawful President and Secretary, respectively;

(d) that the defendants be ordered to return the documents seized from the registration clerk at the annual general meeting;

(e) damages; and

(f) costs.

On 31 July 1993 the High Court at Johor Bahru granted the interim injunction prayed for as per terms in para. (a) above (encl. 64). The defendants have since appealed against that decision which at the date of the hearing of this application is, according to Counsel for the plaintiffs, pending in the Federal Court. However, on 9 September 1994, the defendants filed this application to strike out the writ and statement of claim which came up for hearing before me on 16 March 1995.

In his affidavit, the 1st defendant, acting for himself and on behalf of the defendants (except the 6 & 7 defendants) contended that the writ and statement of claim should be struck out as the Court has no jurisdiction to hear the matter. He claims that since the matter amounts to a dispute amongst office-bearers of a society registered under the Societies Act 1966, the matter has to be referred to the Registrar of Societies in accordance with s. 16 of the said Act and that the Court has no power to deal with the matter.

In his affidavit he further contended that the plaintiffs had been granted the injunction on 31 July 1993 and hence had time to refer the matter to the Registrar of Societies as provided for under the said s. 16 but failed to do so. He then contended that the writ and statement of claim should be struck out as failure by the plaintiffs to refer the matter to the Registrar of Societies is an abuse of the process of the Court.

In his affidavit in reply, the 1st plaintiff stated that the dispute had been referred to the Registrar of Societies via two letters sent by the 2nd plaintiff dated 24 February 1993 and 3 May 1993 respectively but there was no response. He then contended that the defendants cannot plead the said s. 16 at this stage.

At the outset of the hearing of this application, Counsel for the plaintiffs raised a preliminary objection. She argued that the issue of jurisdiction was never raised in the pleadings, namely, in the several statements of defence filed by the various defendants and that an injunction has been granted against the defendants and that the appeal filed by the defendants is still pending in the Federal Court. In support of this preliminary objection Counsel referred to the case of *The "Avro Venture"; Forsythe International Ltd. v. "Avro Venture", Owners of* [1987] 1 MLJ 16 where at p. 17, the Judge said:

> The case, to my mind, reinforces that under the Rules of Court a defendant who objects to an irregularity in the writ of summons or the service of the writ or to jurisdiction must, if he wants to raise the ground, enter conditional appearance. In the present case, the defendants are, of course, at liberty to raise the issue of jurisdiction **in limine**. They may raise it as a defence to the action. And, they can have the issue determined first as a preliminary issue. But, as they had entered unconditional appearance, they may not raise it now at this stage of the proceedings.

In reply, Counsel for the defendants argued that the preliminary objection should be dismissed as no notice was given and that she was caught by surprise. I think the law is clear. Bearing in mind the decision in *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor.* [1985] 1 MLJ 394 wherein the Judge said that by filing affidavits in opposition and failing to give prior notice

of an intention to raise a preliminary objection, the party which raised it has waived their rights to take the preliminary objection, I overruled the objection and ordered the hearing of the application to proceed on its merits.

Counsel for the defendants argued that since the matter amounts to a dispute arising from an election of office-bearers of a registered society under the said Act, it has to be referred to the Registrar of Societies as provided for under s. 16 of the said Act. Section 16 of the Societies Act reads:

> (1) If the Registrar is of the opinion that a dispute has occurred among the members or office-bearers of a registered society as a result of which the Registrar is not satisfied of the identity of the persons who have been properly constituted as office-bearers of the society, the Registrar may serve notice on the society requiring the society, within one month of the service of such notice, to produce to him evidence of the settlement of any such dispute and of the proper appointment of the lawful office-bearers of the society or of the institution of proceedings for the settlement of such dispute.
>
> (2) If any such notice as is provided in sub-section (1) is not complied with to the satisfaction of the Registrar within the period of one month or any extension thereof allowed by the Registrar, the Registrar may cancel the registration of the society.

Counsel for the defendants then argued that s. 16 is a mandatory provision and ousts the jurisdiction of the Courts. To support his contention he referred to three authorities namely, *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* (No. 2) [1983] 1 MLJ 412, *S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors.* [1993] 2 AMR 41:3047 and *Subramaniam v. Tan Lee Leng* [1980] 1 MLJ 171.

In her reply, Counsel for the plaintiffs argued that the plaintiffs had referred the matter to the Registrar but there had been no response so far. They had done what they had to do in compliance with the requirements under the said s. 16 and could not be faulted if there has been no response from the Registrar. She then argued that this application should have been filed immediately after appearances were entered by the defendants and she made reference to O. 12 r. 7 and O. 92 r. 4.

I think there are two issues in this application, namely:

(a) whether this application is appropriate at this stage of the proceedings; and

(b) be that as it may, whether s. 16 of the Societies Act has ousted the jurisdiction of the Courts.

I shall firstly deal with the second issue. From my reading of s. 16, I am of the view that the section is not at all a mandatory section neither does it oust the jurisdiction of the Courts. The Act confers upon the Registrar of Societies several powers, duties and function over societies registered under the Act. He can call for information, and inspect books and documents and he has even the powers of entry to inspect the records of societies. Section 2 of the Act provides that an "office-bearer" of a society means any person who is the president or vice-president, or secretary or treasurer or a member of the committee or governing body thereof, which in the instant case clearly encompass the EXCO of the JCA.

Section 14 of the Act makes it mandatory for a registered society, within 28 days after the holding of its annual general meeting or if no general meeting is held, once in every calendar year, forward to the Registrar certain information including a true and complete list of office-bearers. Consequently, s. 16 provides that the Registrar, if he is of the opinion that a dispute has occurred within a society as a result of which he is not satisfied with the identity of the

office-bearers, may request for evidence of a settlement, if proceedings have been instituted, the society has to inform him. The ingredients of s. 16(1) are as follows, namely, if the Registrar is of the **opinion**:

(i) that a **dispute** has occurred among the members or office-bearers;

(ii) as a result of which the Registrar is not satisfied of the identity of the persons who have been properly constituted as office-bearers of the society;

(iii) the Registrar **may** serve notice on the society;

(iv) requiring the society, within one month, to produce to him:

(a) evidence of the settlement of any such dispute and of the proper appointment of office-bearers of the society; or

(b) **of the institution of proceedings for the settlement of such dispute.**

Section 16(2) provides that if such notice is not complied with to the satisfaction of the Registrar, within one month or any extension thereof, he may cancel the registration of the society.

Looking at the ingredients of s. 16 as stated above, I cannot see how the contention that the section is a mandatory section and ousts the jurisdiction of the Court, can hold water. The section does not even provide that the Registrar shall determine the dispute or adjudicate upon it. The section merely provides that if the Registrar is of the opinion that a dispute has occurred as a result of which he is not satisfied of the identity of the persons who have been properly constituted as office-bearers, he may serve such notice upon the society. Upon receiving the notice, the society has to comply with it and if proceedings have been instituted, the society has to inform the Registrar. I am of the view that 'proceedings' here would mean proceedings in Court.

I would think that the Registrar will only be aware that a dispute has arisen within the society if he receives information or a complaint. I am of the view that even upon receipt of such information or complaint, he still has a discretion as to whether he should send the notice as contemplated by s. 16. If he is of the opinion that there is no such dispute, he need not issue such notice; in the instant case the plaintiffs had claimed that they had sent two letters to the Registrar informing him about the dispute. Furthermore, under s. 14 of the Act, the JCA, regardless of who its office-bearers are after the said annual general meeting held on 20 February 1993, is required to send, amongst other information, a true and complete list of its office-bearers. Thus, if the Registrar had not acted upon the said letters informing him about the dispute and he has received the true and complete list of the office-bearers of the JCA, I would presume, under the circumstances, that the Registrar was not of the opinion that a dispute has occurred. That being so, I cannot see what course of action can be taken by the plaintiffs except to seek relief from the Courts to settle the dispute.

With respect I cannot see the relevance of those authorities cited by Counsel for the defendants. In *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* (No. 2) the dispute centred upon a dispute by members of a co-operative society registered under the Co-operatives Societies Ordinance 1948. The Court held that since the dispute fell squarely under s. 49 of the Ordinance, the dispute had to be referred to the Registrar-General of Co-operative Societies as provided for in that section. Section 49 reads:

(1) If any dispute touching the business of a registered society arises:

(a) among members, past members and persons claiming through members, past members and deceased members;

such dispute shall be referred to the Registrar-General for decision.

Section 49(2) provides:

The Registrar-General may, on receipt of a reference under subsection (1) of this section:

(a) decide the dispute himself;

(b) refer it for disposal to an arbitrator or arbitrators; or

(c) require the parties concerned to refer the dispute to a Court.

In that case, the Judge said (at p. 414):

where the intention of the legislation is clear for a preference for a domestic remedy first then this privilege should be allowed and the Court should be slow to interfere in the first instance.

It is clear from the above that s. 49 of the said Ordinance is not in *pari materia* with s. 16 of the Societies Act. Under the Co-operative Societies Ordinance it is clear that the Registrar-General is empowered to adjudicate upon disputes occurring within a co-operative society, whereas under the Societies Act, the Registrar of Societies has no such power. That being so, in the instant case, I cannot see how Registrar of Societies can adjudicate upon the dispute if he is not empowered to do so.

Incidentally, s. 40 of the Act provides that disputes between a member and the society or office-bearer shall be decided in the manner directed by the rules of a registered society and that the decision so given shall be binding and conclusive on all parties without appeal and shall not be removable to any Court or restrainable by injunction; the parties to the dispute may by consent refer the dispute to the Registrar who shall hear and determine the dispute, but that section is only applicable to Mutual Benefit Societies. Looking at the definition of "mutual benefit society" as provided for in s. 2 of the Act and upon perusal of the by-laws and constitution of the JCA, I do not think the JCA is such a society.

Counsel for the defendants, as stated above, had also referred to the case of *SI Rajah & Anor. v. Dato Mak Hon. Kam & 11 Ors.*; he referred to what the Judge said at p. 3058:

Upon a careful reading of the Societies Act 1966 I am fully satisfied that the legislators of the said Act intended to confer on the Registrar of Societies full power to deal with matters concerning the functions and administration of societies - including the appointment of office bearers of societies, as well as disputes arising between members of a society and its office bearers subject only to the supervisory power of the Minister for the time being charged with the responsibility of the registration of societies.

With respect, I think the facts in that case were different, namely, the society wherein the dispute had occurred among its office-bearers is a political party and hence the special provisions under Part IA which are applicable to political parties will have to be invoked; furthermore that dispute has yet to be referred to the Registrar of Societies before the trial of that suit. In the instant case, the Registrar had been informed of the dispute by the plaintiffs in February and March 1993 but the Registrar has yet to respond even up to the date of the

hearing of this application. Under the circumstances, since two years have lapsed since the time those letters were sent, I can only infer that the Registrar is not of the opinion that a dispute has occurred.

I do not intend to deal with the case of *Subramaniam v. Tan Lee Leng & Ors.* referred to by Counsel for the defendants as that case relates to the Co-operative Societies Ordinance.

Under the circumstances, it is my finding that s. 16 of the Societies Act does not oust the jurisdiction of the Courts and upon that ground alone, I dismissed with costs the application by the defendants to strike out the writ and statement of claim filed by the plaintiffs.

With regard to the first issue, it was unfortunate that the plaintiffs failed to give notice when they raised the preliminary objection. The defendants' application to strike out the writ together with the statement of claim is based on the ground that it is an abuse of the process of the Court. At p. 225 of Vol. 1, *Mallal's Supreme Court Practice* (2nd Edn.,) by Chang Min Tat, in relation to the words "*abuse of the process of the Court*", the author said:

> The process of the Court must be used *bona fide* and must not be misused. The Court will prevent the improper use of the Court process and will in a suitable case do so summarily where it has been used vexatiously and oppressively;

In the instant case, I cannot see how the writ together with the statement of claim can be said to amount to an abuse of the process of the Court. The plaintiffs had sought relief by informing the Registrar of Societies about the dispute, but had met with no response. Where else can they seek redress except from the Courts. I do not for one moment think that s. 16 of the said Act can preclude them from seeking relief from the Courts.

Order 18 r. 19(1) also provides that the Court may at any stage of the proceedings order to be struck out any writ or anything in any pleading on certain grounds; in the same volume of *Mallal's Supreme Court Practice*, in relation to the words "*at any stage of the proceedings*" the author said:

> Still the application should be made promptly. An application to strike out a statement of claim should be made before serving the defence; ...
>
> But the Court has a discretion and an application may be made even after the pleadings are closed: *Tucker v. Collinson* 34 WR 354.

I think the attitude of the Courts generally is clear - if you intend to strike out a writ or any pleading, you should do it promptly and preferably before filing your defence. In the instant case, defence had been filed and the plaintiffs have even managed to obtain an interim injunction in their favour which is now pending appeal. Under such circumstances it is my opinion that the defendants' application to strike out is not appropriate and as stated earlier, it was unfortunate that the plaintiffs have failed to give notice of their preliminary objection.

Application dismissed with costs.